

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ARTEMIS LAMONT WHALUM.

CASE NO. 08-CV-1838 W (POR)

Plaintiff,  
vs.

**ORDER GRANTING  
DEFENDANTS'  
MOTION TO DISMISS  
(Doc. No. 37.)**

JACOB CUTTINGS; CITY OF EL CAJON; EL CAJON POLICE DEPARTMENT,

### Defendants.

On October 8, 2008, Plaintiff Artemis Lamont Whalum (“Plaintiff”), a state prisoner proceeding *pro se*, commenced this action alleging various constitutional and 42 U.S.C. § 1983 claims. (Doc. No. 1.)

Defendants Jacob Cuttings, the City of El Cajon, and the El Cajon Police Department's (collectively, "Defendants") have moved to dismiss the First Amended Complaint ("FAC"). (Doc. No. 37.) The Court decides the matter on the papers submitted and without oral argument. See S.D. Cal. Civ. R. 7.1(d.1). And for the following reasons, the Court **GRANTS** Defendants' motion to dismiss.

1     I.     BACKGROUND

2                 On or about October 9, 2006, Plaintiff was arrested by Defendant Cuttings. (Doc.  
 3 No. 1 at 2.) During the course of that arrest, Plaintiff claims that Defendant Cuttings  
 4 used excessive force by firing two gunshots into Plaintiff. (*Id.*) The bullets injured  
 5 Plaintiff's spine, right arm, ribs, and collapsed one of his lungs. (*Id.*)

6                 On December 4, 2007, Plaintiff was convicted by a jury of assault with a deadly  
 7 weapon on a police officer and two counts of resisting an executive officer by means of  
 8 threat and violence. Plaintiff was sentenced to seventeen years and four months in  
 9 prison. He is currently incarcerated at the High Desert State Prison, in Susanville, Ca.

10                 On October 6, 2008, Plaintiff filed a notice of appeal in state court. On October  
 11 8, 2008, Plaintiff filed the instant lawsuit. (Doc. No. 1.) Plaintiff claimed that the  
 12 excessive force used by Defendant Cuttings violated his Fourth Amendment right to be  
 13 free from unreasonable arrest and his Fourteenth Amendment right to due process of  
 14 law. (*Id.* at 2.) Plaintiff further alleged that the violation of his constitutional rights was  
 15 caused by Defendant City of El Cajon's policies and failures in regards to the training  
 16 and supervision of Defendant Cuttings. (*Id.* at 2.) Plaintiff sought an award of attorneys'  
 17 fees and costs, in addition to twenty million dollars in damages. (*Id.* at 3.)

18                 On September 16, 2009, this Court dismissed Plaintiff's lawsuit, but granted  
 19 Plaintiff leave to file a FAC. (See Doc. Nos. 29, 34.)

20                 On October 1, 2009, the California Court of Appeal affirmed Plaintiff's  
 21 conviction in a written decision. People v. Whalum, Fourth Appellate District, Division  
 22 One, Case No. D053834, 2009 WL 3154971. On January 13, 2010, Plaintiff's petition  
 23 for review was denied by the California Supreme Court. People v. Whalum, Case No.  
 24 S177791.<sup>1</sup>

25                 On February 22, 2010, Plaintiff filed his FAC. (Doc. No. 36.) And on March 12,  
 26 2010, Defendants moved to dismiss the action. (Doc. No. 37.)

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 28                 <sup>1</sup> Defendants' request for judicial notice of Plaintiff's state court appellate  
 proceedings is GRANTED pursuant to Federal Rule of Evidence 201. (Doc. No. 37-2.)

1     **II.    LEGAL STANDARD**

2         The court must dismiss a cause of action for failure to state a claim upon which  
 3 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)  
 4 tests the complaint's sufficiency. See North Star Int'l. v. Arizona Corp. Comm'n, 720  
 5 F.2d 578, 581 (9th Cir. 1983). All material allegations in the complaint, "even if  
 6 doubtful in fact," are assumed to be true. Id. The court must assume the truth of all  
 7 factual allegations and must "construe them in the light most favorable to the  
 8 nonmoving party." Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also  
 9 Walleri v. Fed. Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).

10         As the Supreme Court explained, "[w]hile a complaint attacked by a Rule  
 11 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's  
 12 obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels  
 13 and conclusions, and a formulaic recitation of the elements of a cause of action will not  
 14 do." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007). Instead, the  
 15 allegations in the complaint "must be enough to raise a right to relief above the  
 16 speculative level." Id. at 1964–65. A complaint may be dismissed as a matter of law  
 17 either for lack of a cognizable legal theory or for insufficient facts under a cognizable  
 18 theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)

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20     **III.    DISCUSSION**

21         On February 22, 2010, Plaintiff filed the First Amended Complaint. That  
 22 document is insufficient to maintain this lawsuit for at least two reasons. First, the  
 23 document filed as the FAC was duly titled as: (1) a First Amended Complaint, and (2)  
 24 as an Objection to Magistrate Judge Porter's original Report and Recommendation.  
 25 Upon review, however, the document is purely an objection to Magistrate Judge Porter's  
 26 Report. This Court has already adopted Magistrate Judge Porter's well-reasoned analysis  
 27 and will not entertain an untimely discussion of that previous ruling.

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1       Second, the FAC is not legally cognizable. Despite this Court's previous ruling,  
 2 Plaintiff still maintains that he did not pose a threat to Officer Cuttings *during* his arrest  
 3 and that any evidence to the contrary is untrue. (Doc. No. 36 at 2.) This allegation  
 4 directly challenges the jury's findings and calls into question the lawfulness of his  
 5 California conviction. As such, Plaintiff's lawsuit is barred unless he can "prove that the  
 6 conviction or sentence has been reversed on direct appeal, expunged by executive order,  
 7 declared invalid by a state tribunal authorized to make such determination, or called  
 8 into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254."  
 9 Heck 512 U.S. at 486–487; see also Smith v. City of Hemet, 394 F.3d 689,695–698 (9th  
 10 Cir. 2004) (where the Ninth Circuit affirmed that in California the lawfulness of the  
 11 officer's conduct is an essential element of the offense of resisting a peace officer and  
 12 that a Section 1983 action alleging excessive force can be barred by Heck.) The FAC  
 13 never mentions the status or outcome of any reviewing court, and thus, the Court must  
 14 dismiss Plaintiff's lawsuit.

15       Moreover, the Court is now aware that Plaintiff is unable to make the required  
 16 showing under Heck. As mentioned above, this Court has taken judicial notice of the  
 17 California Court of Appeal decision that affirmed Plaintiff's convictions for assault with  
 18 a deadly weapon on a police officer and two counts of resisting an executive officer by  
 19 means of threat and violence. And the California Supreme Court has denied Plaintiff's  
 20 petition for review. Thus, the Court will not grant Plaintiff leave to file a Second  
 21 Amended Complaint. See Chaset v. Fleer/Skybox Int'l, 300 F.3d 1083, 1087-88 (9th  
 22 Cir.2002) (concluding that the district court did not abuse its discretion by dismissing  
 23 without leave to amend where amendment would be futile).

24       Accordingly, Plaintiff's lawsuit must be **DISMISSED WITHOUT LEAVE TO**  
 25 **AMEND.**

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1     **IV. CONCLUSION AND ORDER**

2       In light of the foregoing, the Court **GRANTS** Defendants' motion to dismiss  
3 **WITH PREJUDICE**. (Doc. No. 37.)

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5       **IT IS SO ORDERED.**

6       DATED: July 2, 2010

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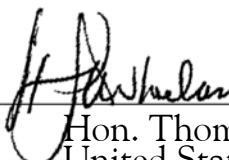
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Hon. Thomas J. Whelan  
United States District Judge